Lipa ak Liban v Public Prosecutor

HIGH COURT (BINTULU) — CRIMINAL APPEAL NO 42–02 OF 2007(BTU)
SANGAU GUNTING J
21 SEPTEMBER 2012

Criminal Procedure — Appeal — Record of appeal — Incomplete — Loss and unavailability of amended charge — Whether hearing of appeal could proceed — Whether incomplete record of appeal basis for acquittal — Whether court should order retrial

Lipa ak Liban ('the appellant') was charged in the sessions court for using a document, which allegedly contained false particulars, an offence under s 11(c) of the Prevention of Corruption Act 1961. The appellant was convicted and sentenced to nine months imprisonment and a fine of RM10,000. Dissatisfied with the conviction and sentence, the appellant lodged a notice of appeal. However, the record of appeal ('the ROA') was incomplete in that all 'exhibits had not been included therein'. Subsequently, the Miri Subordinate Court Registry had indicated that the exhibits were found and supplied the parties with the supplementary record of appeal (the SROA). However, the appellant discovered that the amended charge pertaining to his case, marked PX1, was not contained in the SROA. Despite the efforts of the relevant court staff PX1 could not be found, and neither the appellant nor the respondent could produce a copy thereof. The appellant contended that the loss and therefore unavailability of the amended charge, which was tendered and marked as an exhibit during the proceeding before the sessions court judge, had greatly prejudiced the appellant in that it had left him with a conviction hanging over his head and deprived him of the right to have a proper appeal being heard. The appellant also submitted that since the hearing of the appeal could not proceed, a re-trial could not be ordered. The appellant thus asked for an acquittal and discharge. In response, the prosecution submitted that an incomplete ROA was not a basis for an acquittal and that the court could proceed to hear the appeal by way of revision.

Held, ordering the acquittal and discharge of the appellant:

(1) The notes of proceeding showed the differing views of the prosecution and the appellant as to their respective interpretation of the two versions of the amended charge in the SROA as reproduced in the prosecution's and the defence's respective submission. These conflicting views would have rendered the court's task of resolving the resultant issues extremely difficult if not practically impossible. Further the dispute in the meaning

A and/or construction of certain words and phrases in each parties' version of the amended charge would, in all probability cause substantial difficulty in the proper and exhaustive adjudication of one or more material issues in the appeal. As such, it appeared futile to proceed to hear the appeal (see paras 33–34 & 47–48).

B (2) At the end of the day, bereft of the actual amended charge ie PX1 and this being a criminal case, the task of sorting out where the correct version of the answer to a particular issue would lie would have been practically impossible (see paras 36–37).

C (3) Although the prosecution urged the court to order a retrial, it would be necessary to consider the prejudicial effect of the period of time required by a retrial in addition to the already substantial period of time the case had been hanging over the appellant's head. An order for retrial would also involve the appellant having to incur delay and expenses from another round of trial (see paras 38–39 & 49).

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[Bahasa Malaysia summary

Lipa ak Liban ('perayu') dituduh di mahkamah sesyen kerana menggunakan dokumen, yang didakwa mengandungi butir-butir palsu, satu kesalahan di bawah s 11(c) Akta Pencegahan Rasuah 1961. Perayu disabitkan dan dihukum penjara sembilan bulan dan denda RM10,000. Tidak berpuas hati dengan sabitan dan hukuman, perayu memasukkan notis rayuan. Walau bagaimanapun, rekod rayuan ('RR') tidak lengkap di mana kesemua 'exhibits had not been included therein'. Kemudiannya, Pendaftaran Mahkamah Rendah Miri telah menunjukkan ekshibit-ekhibit telah dijumpai dah telah dibekalkan kepada pihak-pihak dengan rekod rayuan tambahan ('RR tambahan'). Walau bagaimanapun, perayu mendapati bahawa tuduhan yang dipinda berkaitan kesnya, ditanda PX1, tidak terdapat di dalam RR tambahan. Meskipun usaha pekerja mahkamah, PX1 tidak dijumpai, dan begitu juga perayu dan responden tidak dapat mengemukakan salinannya. Perayu berhujah bahawa kehilangan tersebut dan ketiadaan pertuduhan yang dipinda, yang mana telah diserahkan dan ditanda sebagai ekshibit semasa prosiding di hadapan hakim mahkamah sesyen, telah memprejudiskan perayu di mana dia risau akan sabitan dan menafikan dia hak untuk mempunyai rayuan yang betul didengar. Perayu juga berhujah bahawa memandangkan pendengaran rayuan tidak dapat diteruskan, perbicaraan semula tidak dapat diperintahkan. Perayu oleh itu memohon untuk pelepasan dan pembebasan. Dalam menjawab, pihak pendakwaan berhujah bahawa RR yang tidak lengkap bukan asas untuk pelepasan dan bahawa mahkamah boleh meneruskan untuk mendengar melalui semakan.

Diputuskan, memerintahkan pelepasan dan pembebasan perayu:

(1) Nota prosiding menunjukkan pandangan berbeza pihak pendakwaan

dan perayu terhadap tafsiran mereka masing-masing mengenai dua versi pertuduhan yang dipinda di dalam RR tambahan seperti yang dikemukakan di dalam penghujahan pihak pendakwaan dan pembelaan masing-masing. Pandangan berbeza ini akan menyebabkan tugas mahkamah menyelesaikan isu-isu yang timbul amat sukar jika tidak hampir mustahil. Selanjutnya pertikaian dalam maksud dan/atau tafsiran perkataan-perkataan dan frasa-frasa tertentu dalam versi setiap pihak mengenai pertuduhan yang dipinda akan, dalam kesemua kemungkinan menyebabkan kesukaran yang besar dalam penghakiman yang betul dan lengkap terhadap satu atau lebih isu-isu material dalam rayuan. Oleh itu, ia kelihatan sia-sia untuk meneruskan mendengar rayuan (lihat perenggan 33–34 & 47–48).

(2) Walau bagaimanapun, dengan kehilangan pertuduhan yang dipinda sebenar iaitu PX1 dan ini adalah kes jenayah, tugas untuk menyusun versi yang betul jawapan kepada isu tertentu akan dibuat akan menjadi mustahil (lihat perenggan 36–37).

(3) Walaupun pihak pendakwaan menggesa mahkamah untuk perintah perbicaraan semula, adalah perlu untuk mempertimbangkan kesan menjejaskan tempoh masa yang diperlukan oleh perbicaraan semula dalam tambahan kepada tempoh masa substansial kes perayu berjalan. Perintah untuk perbicaraan semula akan melibatkan perayu menanggung kelewatan dan pembelanjaan daripada satu lagi pusingan perbicaraan (lihat perenggan 38–39 & 49).]

Cases referred to

Hari Ram Seghal v PP [1981] 1 MLJ 165 (refd)
Jaafar bin Abu & Anor v PP [1988] 2 MLJ 363, SC (refd)
R v Payne; R v Spillane [1971] 3 All ER 1146, CA (refd)
Tan Hun Wah v PP and another appeal [1994] 1 MLJ 382; [1994] 1 AMR 113, SC (refd)
Yong King Ming v PP [2007] MLJU 676; [2008] 5 AMR 372, HC (refd)

Legislation referred to

Anti-Corruption Act 1997 s 11
Courts of Judicature Act 1964 s 31
Criminal Procedure Code ss 173A(ii)(b), 316, 323, Part VII
Penal Code ss 323, 352
Prevention of Corruption Act 1997 (repealed by the Anti-Corruption Act 1997) ss 11(c), 16, 20(1)(c)

Ranbir Singh Sangha (Ranbir S Sangha & Co) for the appleant.
Nik Azrin Zairin bt Nik Abdullah (Deputy Public Prosecutor, Anti-Corruption Agency Malaysia) for the respondent.

Sangau Gunting J:

PRELIMINARIES

[1] Unfortunately, this case was not included in the list of cases pending grounds of judgment after my transfer from Bintulu to Kuching. As soon as the bundles of documents relating thereto were received during the first and second week of September this year, effort was commenced in trying to get the grounds of decision done as soon as possible.

BRIEF BACKGROUND

[2] Each of two accused, Lipa ak Liban and Hii Teck Heng, was charged separately in the sessions court respectively in Case Nos 61–01 of 2003 and 62–48 of 2003. Lipa was charged for using a document 'Pesanan Kerajaan No 757806' which allegedly contains false particulars. The charge is under s 11(c) of the same Prevention of Corruption Act 1997, and punishable under s 16 of the same Act. Hii was charged for abetting the commission by Lipa of the said offence under s 11(c) of the same Act read with s 20(1)(c) of the same Act. The two cases were jointly heard, resulting in the conviction of of Lipa and acquittal of Hii. Lipa was sentenced to nine months imprisonment and a fine of RM10,000 in default three months imprisonment.

[3] Dissatisfied with the conviction and sentences, Lipa ('the appellant') lodged a notice of appeal. Against conviction the appellant raises 37 purported grounds of appeal. Among the four grounds of appeal against sentence, is the appellant's complaint that the learned sessions judge ordered the sentence in the instant case consecutively with the sentence passed in Criminal Case No 61–01 of 2002 without inquiring as to the status of the latter case. Upon appeal, the latter case has since been ordered by another judge of the High Court of Sabah and Sarawak at Bintulu to be retried.

[4] More of the background of the instant case could be gleaned from the submissions of both parties as well as from the ROA, SROA and the notes of proceedings ('NOP').

[5] Initially the appellant raised the matter of the ROA being incomplete in that 'all exhibits had not been included therein'. Subsequently, after the Miri Subordinate Court Registry had indicated that the exhibits were found, the subordinate court registry supplied the parties with the supplementary record of appeal ('SROA').

[6] The amended charge pertaining to the appellant's case presumably

marked as PX1, however, was still not contained in the SROA. Perhaps, before proceeding further, it ought to be noted that the tracing of the missing exhibits was in all probability complicated by the fact that originally, although actually a Bintulu case, the instant sessions court case was registered in subordinate court registry in Miri. At that time until a few years ago, the court registry for Bintulu cases was centered at Miri. Hearing or trials of Bintulu cases, however, were nevertheless conducted in Bintulu, thereby necessitating the bringing back and forth from Miri of the relevant court files and documentary exhibits. Bintulu court dockets were later transferred from Miri to Bintulu. Perhaps, such a situation contributed to the loss and to the ensuing difficulty in tracing the amended charge sheet which ought to have been, but was not included in either ROA or the SROA. Unfortunately, despite of effort and ample time given, the said amended charge could not be traced.

[7] Anyway, reverting specifically to the amended charges in question (Px1 and Px2, the latter pertaining to the case involving Hii Teck Heng), it would appear that the prosecution/respondent had amended the respective original charges (see pp 60 and 69 of the ROA) against the then first and second accused persons. As just now indicated, the said amended charges are the missing exhibits in both ROA and in the SROA. The SROA was prepared and served only subsequently after the discovery of the missing exhibits in the ROA.

SUBMISSIONS

[8] Implicit in their submissions seems to be the appellant's contention that presumably the ROA and the SROA being authoritative, 'neither party can now produce its own copy of the Amended Charge and have it put in or included as part of the appeal record. It is too late in the day to do that'.

[9] Thereafter, learned counsel for the appellant portrayed why he is unable to prepare the relevant submissions presumably concerning the instant appeal as follows:

> We are unable to prepare the submissions for the very simple reason that the Amended charge shows the elements of the alleged crime the Appellant is supposed to have committed. Since the elements of the offence cannot be established due to the absence of the Amended Charge sheet marked as 'PX' we are unable to relate the evidence adduce (sic) by the Prosecution / Respondent to any element of the alleged offence. In fact in the absence of the Amended Charge Sheet there are no elements of any offence for the Appellant to relate the evidence adduced to.
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> The circumstances the Appellant has been put in has greatly prejudiced him in that the delay in producing a completed Record of Appeal has left him with a conviction hanging over his head and effectively depriving him of the right to have a proper appeal being heard.

A We now humbly and respectfully submit that since there is no prospect of a proper appeal being heard this Honourable Court should err on the side of caution and discharge and acquit the Appellant.

The circumstances of this case show that the prejudice caused to the Appellant cannot be remedied.

B It is also submitted that section 60 of the Court of Judicature Act 1964 permits Your Lordship to exercise Your Lordship's discretion and discharge and acquit the Appellant in this case.

The very basis of the Respondent's case is contained in the Amended Charge Sheets. Without the Amended Charge Sheets the evidence adduced cannot link itself to any ingredients as the ingredients of the offence do not exist in the Record of Appeal.

[10] In a subsequent written submission in reply, the learned deputy public D prosecutor ('DPP') Puan Nik Azrin Zairi bt Nik Abdullah, inter alia, stated:

I have instructed our BPR officer … to make inquiries to the Registrar of the Miri Court and I was informed that the court's file for the case PP v Lipa anak Liban *No.: 61-1-2003(BTU)* was forwarded to the High Court of Bintulu. I believe that both the amended charge will be in the court's file.

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The learned counsel for the Appellant … asked for an acquittal and discharge because the Record of Appeal was incomplete (both amended charge was (sic) not included in the records). We humbly submit this is without point.

F The fault in not including the amended charges in both the record of appeal and supplementary record of appeal is purely administrative and *will not* cause a miscarriage of justice, if necessary steps are taken by the Registry to provide us with a further supplementary record of appeal of the said amended charges. We humbly submit an *incomplete Record of Appeal is not a basis for an acquittal* and there is no authority to support the learned counsel's submission.

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[11] Notwithstanding what the learned DPP has just said, it seems quite clear that she did seem to have nevertheless expressed, albeit tacitly, her concern about the possible ramifications of the said amended charges being not in the ROA. In line with the contentions in her aforesaid written submission, the H learned DPP then asked for time to search for the amended charges, marked PX1 and PX2 and the appellant's counsel agreed.

[12] It would appear that despite of effort by the relevant court staff, the I aforesaid amended charges could not be found, and neither could either the appellant or the respondent produce a copy thereof. The said amended charge marked PX1 not included in both ROA and SROA, therefore, remained missing. This seems to be the basis for the appellant's counsel's contention in his subsequent submission dated 20 October 2008, thus:

… the hearing of the Appeal cannot proceed as the Appellant is unable to relate the evidence adduced during the trial to the elements of the respective amended charges. The only question left to be determined by this Honourable Court is whether to Discharge and Acquit the Appellant or order a re-trial.

[13] Referring to the wordings of s 316 of the Criminal Procedure Code, learned counsel for the appellant submitted that the phrases therein, 'At the hearing of … if he considers …' means, if Your Lordship's (sic) proceeds to hear the case and considers the merits. In our present case, there is nothing to consider because the appeal cannot proceed through no fault of the appellant or respondent. Since the *appeal cannot proceed* Your Lordship has no discretion to order a retrial and there is no hearing of the appeal as envisaged by s 316 of the Criminal Procedure Code'.

[14] Learned counsel then referred to *Yong King Ming v Public Prosecutor* [2008] 5 AMR 372, and quoted the following: '… However, s 316 of the Criminal Procedure Code gives the High Court the power to order a re-trial. This power can only be exercised after the hearing of the appeal and not because the parties have consented for a re-trial'. Learned counsel contends, 'That being the case … a retrial is out of the question and as such the Appellant should be discharged and acquitted'.

[15] The appellant's counsel gave two other reasons why the appellant should be discharged and acquitted. They are as follows (quoted in full):

(a) There has been a long delay from the date the Appellant was charged in the Sessions Court til today and it has prejudiced the Appellant to have this case hanging over his head for what seems to him to be an eternity. A retrial would just pro-long such agony and therefore result in a miscarriage of justice.

(b) The Appellant exercised his right of appeal by complying with Section 307 of the Criminal Procedure Code and now through no fault of his own, if a retrial is ordered he may have to go through a retrial due to procedural errors committed during the compilation of the Appeal Record. This in itself will be miscarriage of justice in that the accused will again have to face the agony of a lengthy full trial and incur further legal expenses.

[16] Meanwhile both parties requested for more time to trace the amended charge particularly PX1. On 21 November 2008, citing the case of *Jaafar bin Abu & Anor v Public Prosecutor* [1988] 2 MLJ 363, the learned DPP contended, that the court could proceed to hear the appeal by way of revision. The appellant's counsel, however, distinguished the case of *Jaafar Abu*. In that case after the conviction of the accused, no grounds of judgment was supplied. The appellant's counsel says, the grounds of judgment is not evidence. Submitting

to the effect that in the present case the incompleteness of the Record of Appeal was due to the missing amended charge sheet marked as PX1, counsel contends once it is marked, the amended charge sheet is evidence. In his view, '… where evidence is absent hearing of the appeal cannot proceed'.

[17] Learned counsel criticised presumably the respondent's suggestion to refer to the elements of the amended charge PX1 in the submissions by both the defence and prosecution as contained in the ROA. Counsel says, 'Submissions are statement from the bar, they are not authoritative and they are not evidence. As such … the hearing of this appeal cannot proceed'. Quite clearly there is merit in such a contention, particularly as regards the elements of the offence based on the missing amended charge.

[18] The appellant's counsel further submitted: '… there ought not to be retrial because it is prejudicial to the appellant in that the evidence which was available and recorded in the main thai in the Sessions Court is no longer available. This is due to the death of Hii Teck Heng - DW2. I have here a certified true copy of his death certificate. For these reason the appellant should be discharged and acquitted. I refer to *Yong Kong Ming*'s case [2008] 5 AMR 372. Neither can we proceed with appeal because the basis of the submission are the elements contained in the amended charge sheet - marked PX1. In the absence of PX1 parties cannot relate the evidence to the elements of the charge'.

[19] The appellant's counsel submitted to the effect, that in any case amendments which could be gathered from the written submissions of both parties pertain only to the date and place but 'not to other elements which are crucial'. In insisting that appeal should proceed, the learned DPP contended, 'Elements of Section 11(c) of this offence can still be evaluated from the evidence of witness and documentary evidence'.

[20] This court then ruled that hearing of the appeal was to proceed, 'without prejudice to learned counsel for the appellant to raise any point emanating from or consequential to the missing amended charge ie not being part of the record of appeal if necessary at a later stage'.

[21] On 05 February 2009, the appellant's counsel, besides tendering another case authority, *Tan Hun Wah v Public Prosecutor and another appeal* [1994] 1 MLJ 382; [1994] 1 AMR 113 pointed out, inter alia, that '(t)he amended charge sheet in both parties submissions do not match each other. The elements do not match each other'. The learned DPP also revealed that presumably despite of the amended charge sheet in question having been tendered by the prosecution themselves, the prosecution did not have a copy thereof.

[22] More specifically, to highlight the differences between the amended charge as stated in the prosecution's submission (on p 2 of the SROA) and the amended charge in the defence submission (on p 7 of the SROA), learned counsel for the appellant reproduced both versions of presumably the amended charge in his written submission dated 10 December 2008. Thereafter counsel pointed out some features in both versions which show differences between the two versions of the amended charge as reproduced in the prosecution's and defence submissions.

[23] The appellant's counsel points out that in the amended charge as stated in the prosecution's submission 'full stops appear where possibly commas should appear and these errors dissolve the meaning of the charge or tends to mislead the Accused. An example are the words '… dengan niat untuk memperdayakan principal kamu mempunyai kepentingan dan mengandungi butiran palsu'.

[24] According to the appellant's counsel, 'This statement in the alleged amended charge does not specify with any certainty whether the accused had intended to mislead his principal (ie the Government of Malaysia) or whether the Accused (sic) principal had an interest in the subject matter of the charge … (T)he sentence structure makes it impossible for either party to come to a conclusion as to what message the element is actually conveying to its reader'.

[25] Learned counsel for the appellant raises the point that as the original amended charge was tendered by the prosecution as an exhibit, the original amended charge should have, therefore, been accurately reproduced in the prosecution's submission (see p 2 of the SROA).

[26] Concerning the version of the amended charge as reproduced in the defence submission (see p 7 of the SROA), the underlined portions ie '… yang mana principal kamu …' do not appear in the prosecution's version … Due to the differences between the 2 alleged amended charges the question arises which one should the Appellant follow when making his Submission at the Appellate stage in the High Court'. The appellant also reiterated, that 'only the original amended charge sheet is authoritative and that the alleged amended charge as contained in the parties (sic) Submissions are statements from the bar and therefore cannot be authoritative'.

[27] The appellant further submits, '… the written statements from the bar have shown that neither of the reproduction of the amended charge (sic) and as such the Appellant is irreparably prejudiced in that it is impossible to properly submit on the issue'.

[28] As regards the contention of the learned DPP that 'the amendment was

with regard to the date and place of the charge,' the appellant's counsel says the information given by the learned DPP was 'incorrect'. In this connection, counsel points out: 'The original charge (presumably on page 9 of ROA) … states '… yang mana principal kamu, ia itu Akauntan Negara Malaysia' where as both versions of the alleged amended charge refer to '… ejen Kerajaan Malaysia …'.

[29] The appellant's counsel further submits: 'Ground 2.1 of the Petition of Appeal deals with this element of the charge. Therefore it is a material amendment and not just one that is permissible by the law automatically.' Counsel also contends, '… since the learned Deputy Public Prosecutor pursued the argument that only the date and time were changed in the Amended sheet, that can only mean that there is yet another version of the Amended charged (sic) sheet which is in the possession of the Respondent whereby the element pertaining to 'who the Accused's principal is' remains unchanged from the original charge, i.e. that the Accused's principle (sic) is 'Jabatan Akauntan Negara Malaysia' and not 'Ejen Kerajaan Malaysia'.

[30] According to the appellant's counsel presumably at the sessions court he was representing the second accused Mr Hii Teck Heng, while the first accused Mr Lipa ak Liban (the appellant in the instant appeal) was represented by Mr Musa Dinggat. At the appeal stage of Mr Lipa's case, counsel says he took over from Mr Musa Dinggat as Mr Lipa's counsel, but he (Mr Ranbir Singh Sangha) had the amended charge sheet only for the second accused. As matters turned out, that amended charge sheet in respect of the second accused is also missing from the ROA and SROA. According to Mr Ranbir Singh Sangha, after taking over from Mr Musa Dinggat, he could not confirm which version of the charge is the true version. Counsel also maintains that 'since the copy (of presumably the amended charge sheet) is not part of the Record of Appeal, it cannot be looked at'.

[31] Consequential to the missing amended charge sheet marked as PX1, learned counsel for the appellant came with the following question: 'In preparing the written submission which version of the amended charge should be parties refer to ie the one in the Prosecution's written submission at page 2 of the Supplementary Record of Appeal or to the version in the Respondent's possession which does not yet form part of the Record of Appeal?' It is counsel's view that without the aforesaid question being answered, it is impossible to prepare the written submissions.

[32] The circumstances adumbrated above appear to have prompted the appellant's counsel to submit as follows: 'Naturally it is our opinion that it is too late in the day for the Respondent to include another copy of an alleged amended charge in the Record of Appeal and since there are 2 conflicting

versions of the amended charge in the Record of Appeal it is impossible for the Honourable Court to decided (sic) which one is the correct amended charge and which one is wrong. Therefore the only option left is to discharge and acquit the Appellant and since the hearing of the Appeal cannot proceed a retrial cannot be ordered. We therefore humbly pray that the Appellant be discharged and acquitted and the cash bail deposit as well and (sic) the fine of RM10,000.00 be refunded'.

[33] The notes of proceeding dated 5 February 2009 shows essentially the exchanges of views between the learned DPP and learned counsel for the appellant as to their respective interpretations of the various highlighted differing features of the two versions of the amended charge in the supplementary record of appeal as reproduced in the prosecution's and the defence's respective submission. The rather peculiar situation of this case appeared to have been made more complicated by learned DPP's not having prepared a written submission in reply to the rather detailed written submission of the appellant's counsel.

[34] It may be pertinent to note as well the learned DPP's revelation during the proceeding, that the prosecution who, in the first place, tendered the amended charge did not have a copy thereof. It would be appreciated that the complications arising from the nature of the various purported differences between the appellant's and respondent's conflicting versions of the amended charge in question as reflected in the features highlighted, have rendered the court's task of resolving the resultant issues extremely difficult if not practically impossible.

[35] For instance, among the features giving rise to persisting dispute between the parties is the fact that the phrase 'yang mana principal kamu' is missing in the prosecution's version of the amended charge as reproduced in the prosecution's submission in the supplementary record of appeal. In her attempt to convince the court that such omission was caused by 'a typo error', the learned DPP referred to the said phrase presumably being present 'at page 3 of the Supplementary Record of Appeal at the 2nd Accused's is (sic) amended charge', and also to the wordings of s 11 of the Anti-Corruption Act 1997, particularly the words, '… dengannya principal itu mempunyai kepentingan'. Here the learned DPP appears to be referring to the charge against the second accused as reproduced in the prosecution's submission before the sessions court. The subsequent portion of the learned DPP's oral submission, however, appears to have indicated, that 'the 'amended' charge against the 2nd accused is not included the Record of Appeal'.

[36] At the end of the day, it was this court's finding that bereft of the actual amended charge sheet (PX1) in question, in the circumstances and this being a

criminal case, it remains tenable the appellant's contention earlier referred to, that due to the missing amended charge which presumably 'shows the elements of the alleged crime the appellant is supposed to have committed', the appellant is 'unable to relate the evidence adduce (sic) by the Prosecution/Respondent to any element of the alleged offence'.

[37] Due substantially to the missing amended charge sheet (PX1), it was quite clearly impractical for the court to proceed with the hearing of the appeal. Ultimately, the court would have to find a basis for its conclusion or finding on certain issues, a substantial portion of which would invariably relate to the essential elements of the alleged offence as presumably would have been sufficiently indicated by the said missing amended charge, had it been included in the ROA or SROA. In that situation where the amended charge is not included in the ROA and SROA, in the event hearing of the appeal proceeded, at the end of it, there would have been practically no boundary for either appellant or respondent to find reasons for claiming as true and/or correct their respective version of an issue pertaining to any one or more essential element(s) of the offence the appellant was supposed to have actually committed. Bereft of the amended charge in question, the task of sorting out where the correct version of the answer to a particular issue lies in all probability would have been practically impossible.

[38] On the issue of whether to order a retrial, there is in the first place the point arising from the wordings of s 316 of the Criminal Procedure Code as enunciated in *Yong King Ming v Public Prosecutor* [2007] MLJU 676, '… However, s 316 of the Criminal Procedure Code gives the High Court the power to order a retrial. This power can only exercised after the hearing of the appeal and not because the parties have consented for a retrial'.

[39] Then there is the issue of the prejudicial effect of the period of time required by a retrial in addition to the already substantial period of time the case has been hanging over the head of the appellant since the time when the appellant was first charged in the sessions court until the disposal of the appeal. In the event of a retrial being ordered through no fault of either the appellant or the respondent, but rather due perhaps to, in the words of counsel for the appellant, 'procedural errors committed during the compilation of the Appeal Record', it did appear tenable the appellant's counsel's contention, to the effect that there is no alternative but to make an order that the appellant be discharged and acquitted. It is here to be reinterated, that even after the preparation of the SROA and at all material times thereafter, the amended charge marked PX1 in question remained untraceable.

[40] In *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165 by way of revision the applicant sought to move the court into exercising its revisionary

powers to dispose of two appeals. The records of appeals were unobtainable because when the magistrate who tried the case left the service for further studies, he brought with him the records of proceedings for the purpose of writing his grounds of judgment. As matters turned out, the magistrate did not write the grounds of his decision; neither did he return the records.

[41] The magistrate had found as proved against the applicant the offences under ss 352 and 323 of the Penal Code. For the offence under s 352 the applicant was bound over under s 173A(ii)(b) of the Criminal Procedure Code, and concerning the offence under s 323 he was convicted and fined RM500 or three months' in default.

[42] A notice of appeal was filed within the statutory period. But the unavailability of the records prompted the applicant to approach by way of revision under s 323 of the Criminal Procedure Code. The learned judge, Wan Yahya J, was of the view that the powers of revision as contained in Part VII of the Criminal Procedure Code and s 31 of the Courts of Judicature Act 'must be given a wider interpretation.' The learned judge went on to say that '(t)he object of these provisions is to correct any miscarriage of justice arising not only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence'.

[43] In that case it seems the learned deputy public prosecutor had urged upon the court to order a retrial 'as the events leading to the loss of the records could not be attributed to the prosecution'. However, the learned judge said, '… but what we are concerned with at this stage is not so much as to the verdict of the prosecution's or Magistrate's fault, but *how to provide a just remedy to the applicant's case*'. (Emphasis added.)

[44] Having referred to, inter alia, the applicant's having been 'denied justice for almost 3 years since he filed his notice of appeal against a conviction on a comparatively small offence … An order for retrial would involve further delay not to mention expense and suffering which he will be put to … witnesses may have little or no recollection and some may be longer available …' in respect of the two aforementioned offences, the learned judge respectively set aside the binding over order and quashed the conviction and acquitted and discharged the applicant.

[45] Prior to making the aforesaid order, the learned judge also referred to the case of *R v Payne; R v Spillane* [1971] 3 All ER 1146. The portion of His Lordship's judgment which refers to *R v Payne & Spillane* may perhaps be quite pertinent to some extent to the instant case: 'A somewhat similar circumstance involving more serious charges arose in *R v Payne & Spillane*. In that case, due

to a mistake, the shorthand notes of the summing up to the jury were not properly taken down by a competent shorthand writer and were therefore unavailable on appeal. The Court of Criminal Appeal quashed the conviction because of what Megaw LJ described as '… very great difficulties and the very great possibility of miscarriage of justice …' (p 1148 f–g).

[46] The instant case would appear to have some resemblance of the difficulty encountered in both *Hari Ram Seghal v Public Prosecutor* and *R v Payne & Spillane*. The former concerns the unavailability of presumably the entire record of proceedings, the latter concerns the shorthand notes of the summing up not having been properly taken down, while the instant case concerns the loss and therefore unavailability of the amended charge which was tendered and marked during the proceeding before the learned sessions judge.

[47] After considering the submissions on the issue of whether, notwithstanding the unavailability of the said tendered and marked amended charge sheet (which would in all probability show the precise words and phrases used), this court could and ought to proceed to hear the appeal, I was of the view that, in any case, due to the dispute highlighted in the parties' subsequent submissions concerning the meaning and/or construction of certain words, phrases and features in each version of the amended charge that each of the parties came up with (based on their respective version as reproduced in their respective submission) being serious enough that it would, in all probability, in any case, cause substantial difficulty in the proper and exhaustive adjudication of one or more material issue(s) in the appeal.

[48] More seriously, such dispute as to the meaning and/or construction of the words, phrases and features highlighted in the differing versions of the amended charge as reproduced in the respective submission of the prosecution and the defence, quite clearly made it seriously doubtful the ability of the appellant and his counsel to properly conduct their case. As such it appeared to me to be futile to proceed to hear the appeal when the said amended charge sheet is unavailable, and there exist serious dispute as to the meanings and/or construction of the words, phrases and other highlighted features of the only available, albeit differing, purported versions of the tendered and marked charge sheet in question.

[49] I may have been wrong in making an order that the appellant be acquitted and discharged rather than ordering a retrial, but as earlier indicated, a substantial part of grounds for this decision is the great hardship that would in all probability be incurred by the appellant consequential not only to the death of the second accused, but also the delay and expenses that would be incurred by the appellant in the event of him undergoing another round of trial.

[50] It was based essentially upon the grounds adumbrated above, that this court made the order as it did in this case.

Appellant ordered to be acquitted and discharged.

Reported by Kohila Nesan